No. 11988

United States Court of Appeals

For the Ninth Circuit

SAM CATRINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

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HARLOW PEASE, Assistant United States Attorney, Butte, Montana,

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BRIEF OF APPELLEE

STATEMENT OF FACTS

Appellant's statement of the case is wholly inadequate. The history of it is this:

The instant prosecution arose out of an abortive attempt by the appellant, Sam Catrino, to escape conviction on a charge of violating the Indian Liquor Law. Therefore, the history of that charge is essential to an understanding of the charge of obstructing justice and subornation of perjury which resulted in this appeal.

Sam Catrino at all times was the proprietor of the Brunswick Bar in Missoula, Montana, and one John Reinhard was his bartender. Both were prosecuted for selling liquor to an Indian ward named Pat A. Pierre on a day certain, viz., October 20,

1945, at some time not long after 10:00 P. M. of that day. The government proved that the Indian, Pierre, went into the saloon and up to the bar, behind which were Catrino, the proprietor, and Reinhard, the bartender; and that Reinhard in the presence and hearing of Catrino sold a bottle of intoxicating liquor to Pierre. The defense was that not Pierre but some unnamed Mexican went to the bar and bought the liquor, then delivered it to Pierre. In support of this defense one James B. Remaker was called as a witness and testified that he saw the Indian come in, that the Indian first tried to get him, Remaker, to buy the liquor for him, and upon the witness' refusal, the Indian then went to the Mexican and got the Mexican to "make the buy." The defense failed of effect, and the jury convicted both Catrino and Reinhard, and the judgment of conviction became final. (R. 40, 41, 42.) (Thereby arose an adjudication as between the government and Catrino, hereinafter discussed.)

At this point begins the instant case. Separate indictments were returned, one against Remaker for perjury, the other against Catrino and others. Catrino was charged in Count One with subornation of the Remaker testimony, and in Count Two with a violation of Sec. 241 Title 18 U. S. Code in that the defendants, Catrino and Reinhard, did un-

lawfully, corruptly and feloniously influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the District of Montana, predicating the allegations of Count Two on the Renmaker incident and arising out of the same case referred to in Count One, and referring specifically to the charge made by the government against Sam Catrino and John A. Reinhard for a violation of Sec. 241 Title 25 U. S. Code, an unlawful sale of intoxicating liquor to Pat A. Pierre, an Indian ward of the United States.

In Count Three of the indictment the appellant herein, Sam Catrino, is not charged with any offense, but his co-defendant in Counts One and Two, John A. Reinhard, is charged with one John Doe (identified as Lester LaValley) with a violation of Sec. 241 Title 18 U. S. Code, and the allegations set forth and refer to the case of the United States of America vs. Sam Catrino and John A. Reinhard as well as the fact that the charge arose out of the same unlawful sale of wine to Pat A. Pierre, an Indian ward of the United States. Accordingly all three counts of the indictment are based on the same transaction.

Renmaker pleaded guilty and became a witness for the government against Catrino and his co-

defendants. The verdict here appealed from found Catrino guilty of obstruction of justice (Count Two above). Analysis of the Rennaker testimony follows.

In the Indian Liquor case Rennaker had testified that he was in Missoula on the evening of October 20, 1945, having made a short trip with his cattle truck to Post Creek, Montana, that day, a distance of only 53 miles. In fact, as he testified in the instant case, he was not at Post Creek at all, but was delivering a load of cattle to Butte, Montana, a distance of 120 miles from Missoula, Montana, and at the time of the transaction in the Catrino saloon was, of necessity, more than 100 miles away, and so could have known nothing about the liquor sale. Rennaker was a trucker by occupation, with a second-grade education. (R. 71.) Titles to his trucks were held by Catrino, and Catrino used this leverage to exert compulsion on Rennaker to testify in the first case. (R. 48; 66-69.) He also fed him four or five shots of whiskey on the day of the trial to "fortify" him for the job of perjury. (R. 70.)

In view of the full and fair charge to the jury on the subject of corroboration of Rennaker, it becomes important to enumerate the corrobrating witnesses and their testimony:

1. Of outstanding importance is the adjudication worked by the verdict in the liquor case, resulting in the finding of every issue in favor of the government and against Catrino, including the truth or falsity of Rennaker's testimony in that case. See Court's charge. (R. 234-236.)

2. In effect, and of necessity, the Indian liquor case was tried over again. Pierre again testified that he bought the liquor over the bar. (R. 116.)

3. The witness Greenfield, a Police Officer in the City of Missoula on October 20, 1945, witnessed the violation of the Indian Liquor Law by Reinhard and Catrino and specifically stated that he knew Rennaker and that Rennaker was not in the Brunswick Bar at that time. (R. 107-110.)

4. John I. Romer, a stockman of Post Creek, Montana, who had been named as the consignee of cattle by the original testimony of Rennaker, testified that Rennaker did not deliver any cattle to him on October 20, 1945, again supporting Rennaker's statement in the instant case. (R. 103.)

5. Rennaker's wife (R. 42-43.) who kept the books of his trucking business and produced them in court, (Plaintiff's Exhibit 2-A, R. 47-48.) testified that on October 20, 1945, he hauled 25 head of cattle to Butte, Montana, for a man named Davis. She further testified that she accompanied her hus-

band on the trip to Butte, Montana, where they arrived at about midnight. (R. 44-45.)

6. Leonard Lytle, a Brand Inspector employed by the State of Montana, (R. 104.) produced a record of brand inspections of 25 head of cattle for Parke Davis, Butte, Montana, on October 20, 1945. Since the hauling of cattle to Butte and not to Post Creek was the vital test of whether Rennaker's testimony was false in the liquor case and true in the instant case, it is obvious that it was overwhelmingly shown that his latter testimony was true, even regardless of the adjudication.

7. Not only to corroborate Rennaker, but to establish the procurement of his false testimony by Catrino, it was established by Mrs. Rennaker that Catrino held the title to Rennaker's trucks up to and including March 13, 1946, the date of trial of the liquor case. (R. 48.)

8. Rennaker's own testimony is as follows:

> "Q. Who told you about the case, if you remember?
>
> A. Sam did.
>
> Q. Sam Catrino?
>
> A. Yes.
>
> Q. Was any suggestion made or request made of you at the time when Sam talked to you about the case?
>
> A. He said I would be a good witness, make a good witness for him.
>
> Q. For him?

A. Yes.

Q. Did you reply to his statement?

A. I had to.

Q. What was that?

A. I had to.

Q. Why did you have to?

A. He was financing me on trucks and I had to listen to him.

Q. Did Mr. Catrino tell you you had to listen to him?

A. He told me—he didn't say I had to, but he said, "You have got to testify for me."

Q. He said, "You have got to testify for me?"

A. Yes.

Q. Did he tell you how you were to testify?

A. He did.

Q. What is the story he told you you must testify to?

A. Well, he told me to get on the stand and say that an Indian asked me to buy him a quart of wine and I refused him, and the Indian went over and asked a Mexican to buy him a quart of wine and the Mexican bought him a quart of wine and handed it to the Indian and he went out.

Q. Now, did Mr. Catrino tell you that just once?

A. He told me several times." (R. 66-67.)

* * *

"Q. Let us come down to a point near the trial, which as the record shows was held here on March 13, 1946. Now, shortly before the trial, did you have a conversation with either Sam Catrino or John Reinhard as to how you were to testify?

A. Well, Sam - - Sam told me the first time what to testify to and then John, he come along and he says, 'Will you be a witness for us,

Jim?', and I says, 'Of course, I will.'

Q. John Reinhard you mean said that?

A. Yes. He asked me if I would be a witness. He didn't know if I knowed something about it, but Sam says, 'He will be a witness for us.'

Q. When was that, now? How long before the trial did that conversation take place, do you remember?

A. It was right after they was arrested.

Q. Shortly after they were arrested. What else was said at that time?

A. Well, I told him I didn't know. I told Sam I didn't know whether I could remember that or not and he says, 'I'll jog your memory so you will know.'

Q. Was your memory jogged?

A. Several times.

Q. How many times?

A. I couldn't say how many, but six or eight, anyway." (R. 68-69.)

* * *

"Q. You stated there was a conversation held between the three of you on the morning of the trial in the Brunswick Bar. Do you recall what was said at that conversation?

A. Well, I told Sam I didn't like to do that, and he said, 'I'll give you a few shots of whisky,' and he says, 'You will be all right.'

Q. Did he give you a few shots of whisky?

A. He did.

Q. Do you recall how many?

A. Four or five.

Q. Did you go over or review the story you were to tell when you got on the witness stand at that time?

A. Yes.

Q. You reviewed that story with Mr. Catrino and Mr. Reinhard, did you, that morning?

A. That's right.

Q. Did you go into specific dates and where you were to be in the Brunswick Bar that evening?

A. That's right.

Q. You stated a little while ago you had not seen Pat Pierre before you came into the courtroom that day. What were you told about that?

A. They told me, Sam says, 'Do you know Pat Pierre?' and I says, 'No,' and he says, 'You can tell them you did anyway.'" (R. 70-71.)

9. Rennaker was attacked by the defense on the claim that he had been trying to 'shake down" Catrino because the latter had finally taken his trucks away from him and destroyed his trucking business. The alleged shake-down was necesarily an alleged report to the FBI Special Agent. However, witness George Rhoades, Special Agent of the Federal Bureau of Investigation in charge of the investigation, testified that Rennaker never came to him or volunteered any information against Catrino, but that Rhoades went to Rennaker's place and interviewed him. (It is, in addition, somewhat absurd that a man would, for a mere money grudge, inform against another under circumstances such that the informer would himself disclose his own perjury, and be convicted of it, as Rennaker was.)

SUFFICIENCY OF THE INDICTMENT

Appellant in his first specification of error con-

tends that Count Two of the indictment does not charge an offense against the laws of the United States. In his argument the appellant does not argue or cite any authority to sustain the contention nor do we think that he could do so. The appellant contends that Count Two charges subornation of perjury and is the same charge as that contained in Count One. Count One charges in part:

> "The above named defendants, Sam Catrino, and John A. Reinhard, on or about March 13, 1946, at Missoula, in the District of Montana, and within the jurisdiction of this court, did unlawfully, corruptly and feloniously, procure one James B. Rennaker, to commit perjury as follows: * * *" (R. 3.)
>
> While Count Two charges in part that the defendants:
>
> "* * * did unlawfully, corruptly and feloniously influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice in the District Court of the United States for the District of Montana, then in session and engaged in the trial of a cause entitled, 'United States of America vs. Sam Catrino and John A. Reinhard,' wherein said Defendants were charged with and being tried for a violation of section 241 of Title 25 of the United States Code, to-wit: * * *" (R. 4.)

Obviously the charge in the two counts is not the same. Judge Pray consistently overruled the contention of appellants that Count Two charged subornation of perjury, and in reply to the argu-

ment made on the point at the close of the Government's case said:

> "Court: Oh, no, that is based on a definite statute. That is the reason why I overruled your motion. There is a definite statute, a separate and distinct offense." (R. 144.)

Count Two does charge a public offense.
Walker v. United States, 93 F. (2d) 792
United States v. Perlstein, 126 F. (2d) 789
United States v. Polakoff, 112 F. (2d) 888
Nye v. United States, 137 F. (2d) 73
United States v. Bickford, 168 F (2d) 26

McCoy v. United States, decision August 24, 1948, (not yet reported.)

Judge Pray properly held that Count One and Count Two charged separate offenses. As stated by the Circuit Court of Appeals, Tenth Circuit, in Slade v. United States, 85 F. (2d) 786 at 790:

> "While counts seven and eight were predicated on the same transaction, they charged separate and distinct offenses in law, defined in separate provisions of section 135, supra. The first charged an endeavor to accomplish the evil purpose and falls in class one. The second charged the accomplishment of a different evil purpose and falls in class three."
>
> * * *
>
> "Two offenses may be distinct in point of law even though they grow out of the same transaction, if one embraces a different element than the other.
>
> A single act may be an offense against two

statutes, and if the offense defined in one embraces an element not included in the other, an acquittal or conviction under one does not exempt the defendant from prosecution and punishment under the other.

Congress may make each separate step in a transaction a distinct offence."

In that case both charges were defined in the same statute. In the case cited by appellants, Casebeer v. United States, 87 F. (2d) 668, the court said in part:

"Congress may make each separate step in a transaction a distinct offense." (Cases cited.)

And in Hunt v. Hudspeth, 111 F. (2d) 42, the court said in part:

"Congress may make separate steps in a single transaction distinct and separate offenses. Burton v. United States, 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Casebeer v. United States, 10 Cir., 87 F. 2d 668; Slade v. United States, 10 Cir., 85 F. 2d 786.

The test as to whether a single transaction may constitute two separate and distinct offenses is whether the same evidence is required to sustain each charge. If not, then the fact that both charges relate to and grow out of one transaction does not make only a single offense where two distinct offenses are defined by the statute. Gavieres v. United States, 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489; Poffenbarger v. United States, 8 Cir., 20 F. 2d 42."

In the present case we have two different statutory provisions. The element of corroboration is

of itself enough to differentiate the two. Further, to sustain a conviction on Count One it would be necessary to prove the actual subornation while Count Two would be sustained if proof was made of an endeavor to either influence, obstruct or impede justice. On this latter point the Circuit Court of Appeals for the Eighth Circuit discussed the question at length in Bedell v. United States, 78 F. (2d) 358.

APPELLANT'S CONTENTION THAT THE COURT CHARGED THE JURY IT COULD FIND CATRINO GUILTY ON COUNT THREE.

The appellant's specification of error Number 7 states that the Court charged the jury that it could find the defendant Sam Catrino guilty under Count Three of the Indictment. Catrino was not charged in Count Three. In his brief the appellant states:

> "The Court instructed the jury that they could find the Appellant, Sam Catrino, guilty under Count Three of the Indictment (Tr. 229) even though he was not charged as a Defendant under said Count, to which oral charge to the jury the Defendant excepted (Specification of Error Number 7, above)." (Appellant's Brief 23.)

Appellant did not except to any such charge made to the jury. The exception quoted in Specification of Error Number 7 is:

> " 'an exception is made to the Court's charge, in charging the jury as to Count Three, in that the charge was given in connection with the charge against Catrino under Counts One and Two. It is our contention that the charge to the jury under Count Three, wherein Catrino is not a Defendant, is prejudicial to him in his having a fair trial under Count One and Count Two' (Tr. 244)." (Appellant's Brief 6.)

Judge Pray in his charge to the jury read Count Three and in so doing called attention of the jury to the fact that only John A. Reinhard was a defendant as the charge had been dismissed as to LaValley. (R. 227-228.) Then Judge Pray said:

> "That count, as you will recall, now stands only against the defendant John A. Reinhard." (R. 228.)

Again in his charge Judge Pray said:

> "Count 3 of the Indictment does not concern defendant Catrino, but does concern defendant Reinhard." (R. 236.)

The attempt to mislead this Court is obvious.

THE COURT PROPERLY DENIED MOTIONS AS TO COUNT THREE

Appellant specifies error in the Court's refusal to grant the motions to sever Count Three from the Indictment (Specification of Error Number 4) and in refusing to grant to appellant a separate trial (Specification of Error Number 10).

We have heretofore, in our statement of facts, called attention to the basis for this Indictment.

Appellant in his brief quotes from Rule 8 of the Federal Rules of Criminal Procedure. It would seem that the argument made answers itself. All three of the counts in the Indictment are based on the Indian Liquor case and attempts made to defeat or prevent justice being done in that case.

The evidence as to Count Three could not possibly have prejudiced appellant—his brief to the contrary is not supported by law or fact. The Court fully and fairly charged the jury as to Count Three. The jury did find Reinhard, the defendant in that count, not guilty. (R. 15.)

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE VERDICT

The position adopted by appellant in this case seems to be that the Court should have granted the motion for the entry of a judgment of acquittal as to the defendant Catrino. The appellant adopts the position that in order to be convicted on Count Two the government was required to prove that the corruption of justice was successful. We submit that if an endeavor to influence, obstruct or impede the due administration of justice was proven, that would be sufficient. In the case of Bedell v. United States, 78 F (2d) 358, the Court was concerned with an endeavor to corrupt jurors and we believe the statement of the Court in that case is

just as applicable in this case, where we are concerned with a witness. The Court at page 365 said:

> "This statute not only condemns influencing, obstructing, and impeding the due administration of justice, or endeavoring so to do, but it also condemns endeavoring to influence, intimidate, or impede a juror. Count 3 of the indictment charges that the defendants endeavored to influence and impede the juror Gander in the discharge of his duties as a juror. In United States v. Russell, 255 U. S. 138, 41 S. Ct. 260, 261, 65 L. Ed. 553, the Supreme Court, in considering this section, said:
>
> 'The section, however, is not directed at success in corrupting a juror, but at the "'endeavor'" to do so. Experimental approaches to the corruption of a juror are the "'endeavor'" of the section. Guilt is incurred by the trial—success may aggravate: it is not a condition of it.'
>
> Again, the court said:
>
> 'The word of the section is "'endeavor'", and by using it the section got rid of the technicalities which might be urged as besetting the word "'attempt'", and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent.'
>
> It is observed that the success of the endeavor aggravates the offense, and hence it could not well destroy it. The lower court instructed that whether the offense was successful and completed was not a condition to successful prosecution, and this instruction was not excepted to."

We call the court's attention to Judge Pray's comment on the motion made at the close of the government case to point out the effect of the ver-

dict in the Indian Liquor case, out of which this Indictment arose. Judge Pray in that comment very well points out the corroboration apparent from the record in this case. He stated:

> "Court: Well, of course, so far as the perjury, there must be proof of the fact that perjury was actually committed. Now, the judgment roll has been introduced here, and it is found that there was a charge there of selling liquor to an Indian ward of the Government of the United States, and the defendants plead not guilty. That brings to issue, of course, all the material allegations of the information. It was tried and against these two defendants. The jury found, of course, that the defendants were guilty. Now, included in that verdict would also be an adjudication that the defense was false and they didn't believe it, and that the testimony of Rennaker as to how the transaction occurred, and that a Mexican purchased the wine in question and afterwards gave it to Pierre, was false. It seems to me that that is res adjudicata. It is a thing adjudicated and it stands and there can be no further question raised as to the fact of the commission, or as to the guilt of the defendants and the commission of perjury there by reason of the verdict of the jury that they didn't believe the defense that was offered and that it was untrue. Otherwise, they would have been obliged to find for the defendants." (R. 144-145.)
>
> * * *
>
> "Now, if the defendants, one or both of them —they were tried together. There was a defense. They must have procured and presented it. They presented this man Rennaker, who said that the sale of the wine was made to a

Mexican and not to the Indian ward of the government. The verdict of the judgment was that that was not true. But I think the authorities will hold that it is adjudicated, res adjudicata of the facts that were presented there. Now, **it seems to me that there is corroboration there in that very adjudication of the testimony of Rennaker.** Then, too, the facts presented here show where he was, what he was doing, and the defendants must have known, of course, he wasn't there at all and couldn't have been there because the evidence here conclusively shows that he hauled a load of cattle to Butte that night. He didn't come back, or start back, until sometime early in the morning of the 21st of October, 1945. All the circumstances and associations, transactions, business transaction, between Rennaker and the defendants, especially the defendant Catrino, shows a close connection, and if they didn't procure the testimony, who did? How did it happen? It was there and in their presence." (R. 146-147.) (Emphasis ours.)

The doctrine of res judicata, supported by authority produced below, operated to the effect that, as between Sam Catrino and the United States, the falsity of Rennaker's testimony given on the trial of the liquor case was finally adjudged—and of course also that every other material fact in issue between the government and Catrino was similarly adjudged in favor of the government.

Because of the nature of criminal cases, res judicata has been less frequently applied than in civil causes. However, the law is all one way.

In State v. Hopkins, 68 Montana 504, 219 Pac. 1106, a judgment of acquittal was worked by res judicata, because the accused had won a verdict of acquittal in a companion case in which the pertinent transaction was proven on the theory of "system." In this case a careful collection is made of previous decisions and authorities:

People v. Frank, 28 Cal. 507
Bell v. State, 57 Md. 108
Mitchell v. State, 140 Ala. 118,
37 So. 76, 103 A. S. R. 17
Commonwealth v. Evans, 101 Mass. 25.

The opinion in the Hopkins case remarks, "The dearth of authority upon the subject seems almost inexplicable," but goes on to show that it is all one way. In addition to the decisions cited, the following authors appear:

Freeman, Judgments, sec. 318:

"The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases."

2 Van Fleet, Former Adjudication, sec. 628:

"If there is a contest between the state and the defendant in a criminal case, over an issue, I know of no reason why it is not res judicata in another criminal case."

So it results from the verdict and judgment in the Catrino liquor case that Catrino's defense was false, and the material facts testified to by the witneses called by him for that purpose were non-

existent and perjured. Therefore, while the government assumed the burden of corroborating Rennaker's testimony, it discharged that burden by introducing in evidence the judgment roll and transcript of testimony in the liquor case of United States v. Catrino. (R. 40-42 and R. 38, plaintiff's Exhibit No. 1.)

There was, as we have heretofore pointed out in the statement of facts, ample and voluminous corroboration of the witness Rennaker, a man whose education extended only to the second grade. (R. 71.)

Appellant complains of the evidence admitted by the court to show that appellant's attempts or endeavors to influence the witness Rennaker continued after the indictment in this case had been returned. (Specification of Error No. 11.) The witness Rennaker did testify that he was contacted a number of times by appellant after this case had been presented to a Grand Jury sitting in Great Falls, Montana. (R. 72.) In particular Rennaker testified as follows:

> "Q. Have you been contacted by either Sam Catrino or John Reinhard since this indictment was returned by the Grand Jury sitting in Great Falls last spring?
> A. With Sam, yes.
> Q. By Sam?
> A. Yes.

Q. Sam Catrino you mean? Have you had any conversation with Sam Catrino as to how you would testify in this trial?

A. I did.

Q. What was your conversation—strike that. Do you recall when you had a conversation or conversations with Sam Catrino regarding that matter?

A. I had a lot of conversations with him since I come back from Great Falls.

Q. That is, when you say, "come back from Great Falls," you refer to your appearance before the Grand Jury sitting in Great Falls last March?

A. That's right.

Q. You have had a number of conversations with him since that?

A. After that.

Q. Did these refer to how you were to testify in this case?

A. That is what he told me.

Q. What was that?

A. He was trying to get me to testify that he didn't make—force me to lie on the witness stand. He wanted me to get up here and tell the jury he didn't force me to lie on the witness stand."

* * *

A. He told me he would put me back in business after the trial was over if I would testify like that.

Q. Can you tell the Court and jury just what he wanted you to testify to in this trial, just what Mr. Catrino wanted you to testify to in this trial?

A. He wanted—I told you what he wanted me to testify.

Q. Tell me again, possibly I didn't get it all.

A. He wanted me to testify on the witness stand here that he didn't force me to lie on the witness stand.

Q. Anything else?

A. I don't remember now, no. He said for me to go up there and tell on the witness stand that he did not force me to lie and if I would do that, after the trial was over with, he would put me back in business.

Q. Was there anything else that he said that you can now recall?

A. He said if I did that, my sentence wouldn't—I wouldn't be in no trouble or anything. They wouldn't give me very much of a sentence out of it. I might just get a suspended sentence out of the deal.

Q. Was the purpose of that to free Mr. Catrino and you take the sentence, is that the idea?

A. That's right. (R. 73-74.)

* * *

Q. So, you were in and about Missoula after the time the charge was filed against you, in Missoula until about 20 days ago?

A. That's right.

Q. That is the time you referred to having Sam contact you and talk to you about how you should testify during this trial, is that right?

A. That's right.

Q. You said in response to a question by Mr. Taylor that you had not demanded a thousand dollars from Sam Catrino, but your answer was that he offered you some money?

A. He did.

Q. Do you remember how much he offered you?

A. Sam offered me two thousand dollars if I would take the rap." (R. 95.)

Appellant in his brief with reference to the ad-

mission of the foregoing evidence quotes from 20 Am. Jur. Sec. 309, at Page 287, as follows:

> "A person, when placed upon trial for the commission of an offense against the criminal laws, is to be convicted, if at all, on evidence showing his guilt of the particular offense charged in the indictment against him. It is a well established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, **unless the other offenses are connected with the offense for which he is on trial.**" (Brief of Appellant 25.) (Emphasis ours.)

We do not disagree with the foregoing law, and we note the particular applicability of the last clause, "unless the other offenses are connected with the offense for which he is on trial." Certainly the evidence to which objection is made was directly connected with the offense for which Catrino was on trial, and the Court properly held that the evidence was admissible on the question of intent. (R. 72.)

The charge to the jury was complete. The Court fully and fairly instructed the jury as to the credibility of a witness. Appellant apparently takes the position that Rennaker was not a credible witness.

In his brief he states:

> "We contend that a credible witness does not include a witness who confesses he is a perjurer and, this being true, the Court was in error in not granting our motion for an order for the entry of a judgment of acquittal at the conclusion of the Government's case or when all the evidence was in." (Brief of appellant 18.)

The credibility of a witness is, of course, a question for the jury to determine. If we adopt the proposition propounded by appellant, a case for subornation of perjury could seldom, if ever, be proved. Judge Pray properly instructed the jury that they were to judge the credibility of the witnesses and the weight to be given the testimony. (R. 232-233.) The jury has passed upon the credibility of the witnesses. It is urged by appellant that the court should have charged the jury that Remaker was an accomplice with the defendants as to Count Two of the Indictment, and admitting that they did not make a request for such instruction, urged that the court should have so charged the jury notwithstanding their failure to make the request. (Brief of appellant 16.)

In the case of the United States v. Potash, et al, 118 F. (2d) 54, the Circuit Court of Appeals for the

Second Circuit held as follows:

> "Finally, it is urged that the charge was erroneous in that the court failed to tell the jury that the witnesses Loukas and Perry were co-conspirators with Potash and Vafiades and their testimony should be viewed with care and caution. It is enough to say that no such request to charge was made and that this court has held that 'the warning is never an absolute necessity.' United States v. Becker, 2 Cir., 62 F. 2d 1007, 1009."

THE VERDICT SHOULD BE AFFIRMED

It is suggested in the brief of appellant at several points that the verdict of the jury in finding Catrino not guilty as to Count One and guilty as to Count Two was arrived at by compromise. On that question the Supreme Court of the United States in the case of Dunn v. United States, 284, U. S. 390, held that consistency in the verdict is not necessary. We quote as follows from the opinion:

> "The defendant says that the evidence did not warrant a conviction; and that the verdict on the second and third counts is inconsistent with that upon the first, and that for this reason also he is entitled to be discharged. The evidence was the same for all the counts."
>
> * * *
>
> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. Latham v. The Queen, 5 Best & Smith 635, 642, 643. Selvester v. United States, 170 U. S. 262. If separate indictments had been presented against the de-

fendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in Steckler v. United States, 7 F. (2d) 59, 60:

'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'

Compare Horning v. District of Columbia, 254 U. S. 135.

That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." 52 S. Ct. 189, 76 L. Ed. 356.

That case is apparently the leading case on this question.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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